ESTATE OF HELEN FISHER PARKER

IBIA 94-51 Decided April 5, 1995

Appeal from an order denying rehearing issued by Administrative Law Judge Richard L. Reeh in Indian Probate IP OK 91 P 90-1.

Affirmed as modified in part; reversed in part.

1. Indian Probate: Wills: Undue Influence

   To invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of her will was capable of controlling her mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to the decedent's own desires.

2. Indian Probate: Wills: Undue Influence

   When the evidence shows that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption of undue influence is raised, and the burden of rebutting the presumption is on the will proponent.

3. Indian Probate: Wills: Undue Influence

   Even where a testator is entirely dependent upon a will beneficiary for shelter, food, and medication, a confidential relationship is not shown by these circumstances alone. Rather, in the cases where the Board of Indian Appeals has found that a confidential relationship existed, the will beneficiary has had control over the testator's finances.

4. Indian Probate: Attorneys at Law: Fees

   Under 43 CFR 4.281, a petition for award of attorney fees is required to be filed prior to the close of the last hearing.

5. Indian Probate: Hearing: Record--Indian Probate: Claim Against Estate: Allowable Items

Where transcripts of Indian probate hearings are prepared, the responsibility for preparing them rests with the Department of the Interior. Accordingly, the cost of a transcript may not be charged against the estate.

APPEARANCES: F. Browning Pipestem, Esq., Norman, Oklahoma, for appellant; Tony R. Burns, Esq., Anadarko, Oklahoma, for appellees.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Elmer Parker seeks review of a December 1, 1993, order denying rehearing issued by Administrative Law Judge Richard L. Reeh in the estate of Helen Fisher Parker (decedent). Denial of rehearing let stand a September 23, 1993, order approving decedent's will. For the reasons discussed below, the Board modifies and affirms Judge Reeh's orders in part and reverses them in part.

Decedent, Comanche Allottee 1137, died testate on December 31, 1989, at the age of 92. She was survived by six children: Kenneth Parker, Elmer Thomas Parker (appellant), Lillian Margaret Parker Boles (Teresa Am Eavenson), Henry Leon Parker (appellee), Ruth E. Parker Lynn, and Charles Alfred Parker. In her will, executed on February 24, 1976, decedent devised her own allotment to Henry, Ruth and Charles in equal shares; her inherited interests in two allotments to Henry and Ruth in equal shares; and her inherited interests in three allotments to all six children in equal shares. She devised the residue of her estate to Henry's wife, Doris.

Administrative Law Judge Sam E. Taylor held hearings in decedent's estate on May 16, 1991, and October 16, 1991. Present counsel participated in both hearings, at which appellant contended that Henry Parker exerted undue influence upon decedent in the preparation of her will.

Judge Taylor retired prior to issuing a decision in this matter. On September 23, 1993, Judge Reeh issued an order approving decedent's will. 1/ His order stated in part:

> Without question, there was a special confidential relationship between [decedent], her son, Henry, and Henry's wife, Doris. Evidence regarding the relationship is extensive. Although [decedent] was very strong willed, clear of mind and capable of performing many tasks for herself, she was still an elderly and partially incapacitated woman who relied on Henry and Doris for the vast majority of her needs.

1/ Because Judge Reeh was not present at the hearings, the Board reviews witness credibility determinations de novo. Estate of Emerson Eckiwaudah, 27 IBIA 245 (1995).

> Only when a special confidential relationship is coupled with active participation in the preparation or execution of a will, however, does the presumption of undue influence arise. In this case, Henry drove [decedent] to the Agency on the day she made her will. He was also in the room either during discussions with the Scrivener or at the time of execution, or both. Based upon the credible evidence in this action, however, I find that Henry did not actively participate in the preparation of this will. He was allowed in the room only due to [decedent's] specific direction. Moreover, he did not speak one word during the testamentary discussions.
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> * * * * * *
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> In the absence of proof of undue influence arising from the confidential relationship and participation in the procurement or preparation of a will, the four-part test of Estate of Thomas Longtail, Jr., 13 IBIA 136 (1985) and Estate of William Cecil Robedeaux, 1 IBIA 106 (1971) must be applied. * * * Based upon the evidence presented and the credibility of the witnesses, none of these elements has been established. In consequence, there has been no showing of undue influence.
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> * * * Independent Counsel. That, in spite of the conclusion reached above, the following finding of fact is made: Because [the scrivener] had no memory of the event, because [the scrivener] believed that part of his responsibility was to avoid giving any advice relative to the effect of a will and because no other evidence relating to the subject was offered, it is found that [decedent] did not receive the benefit of objective, independent counsel either prior to, or at the time of, making her will. See Estate of Charles Webster Hills, 13 IBIA 188 [(1985)].

(Sept. 23, 1993, Order at 4-5).

On December 1, 1993, judge Reeh denied appellant's petition for rehearing. Appellant appealed to the Board. Briefs were filed by appellant and by appellees Henry and Doris Parker.

Discussion and Conclusions

[1] In Estate of Leona Ketcheshawno Waterman Ely, 20 IBIA 205, 207 (1991), the Board summarized the long established rules concerning proof of undue influence upon an Indian testator:

> Normally, to invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of her will was capable of controlling her mind and actions; (3) such a person

> did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to the decedent's own desires. E.g., Estate of Joseph Poolaw, 18 IBIA 358 (1990). [2/] Further, the burden to prove undue influence is upon the will contestant. E.g., Estate of Alice Jackson (John), [17 IBIA 162 (1989)].

[2] Also in Ely, the Board addressed the bearing of a proven confidential relationship on the determination of whether undue influence was exercised:

> However, when the evidence shows that the principal beneficiary under a will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption of undue influence is raised, and the burden of rebutting the presumption is on the will proponent. E.g., Estate of Jesse Pawnee, 15 IBIA 64 (1986).

(20 IBIA at 207-08). More recently, the Board expressed this rule in a slightly different way:

> [I]n order for a presumption of undue influence to arise from the existence of a confidential relationship, three things must be shown: (1) a confidential relationship existed; (2) the person in the confidential relationship actively participated in the preparation of the will; and (3) the person in the confidential relationship was the principal beneficiary under the will.

Estate of Grace American Horse Tallbird, 26 IBIA 87, 88 (1994).

Judge Reeh found that a confidential relationship existed in this case but that the second factor required to raise a presumption of undue influence--i.e., active participation in the will preparation by the person in the confidential relationship--was not present. He did not discuss the third factor--whether Henry was the principal beneficiary under decedent's will. 3/ Having found that the second factor was not present, Judge Reeh held that a presumption of undue influence did not arise. He therefore applied the general four-part test for undue influence. 4/

2/ See also, e.g., Estate of Thomas Longtail, Jr. and Estate of William Cecil Robedeaux, cited by Judge Reeh.

3/ In light of the conclusions discussed below, the Board also finds it unnecessary to address this issue. It observes, however, that Henry was one of several beneficiaries under the will.

4/ As noted above, Judge Reeh made a specific finding that decedent had not received the benefit of independent counsel. Where a presumption of undue influence has been raised, the will proponent is required to show that an objective, independent person thoroughly discussed the effect of the will with the testator. E.g., Estate of Jesse Pawnee, 15 IBIA at 69.

Because Judge Reeh found that no presumption of undue influence arose in this case, he was not required to making a finding concerning the

On appeal to the Board, appellant contends that Judge Reeh erred in not finding that Henry actively participated in the preparation of decedent's will. For obvious reasons, appellant does not challenge Judge Reeh's finding that a confidential relationship existed. However, even though appellant has not raised the issue, the Board has the authority to address it under its authority to "exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." 43 CFR 4.318. The Board finds that it must exercise the Secretary's inherent authority in this case.

Judge Reeh did not identify the evidence upon which he based his conclusion that there was a special confidential relationship between decedent and Henry and Doris, although he stated that "[e]vidence regarding the relationship is extensive." Upon review of the record, the Board finds that the evidence does not support Judge Reeh's conclusion that a confidential relationship existed.

The evidence established that Henry and Doris were decedent's primary caregivers, beginning about 1975, when decedent apparently suffered a stroke; 5/ that they lived close to decedent and spent a considerable amount of time at her house; and that Doris helped decedent with her finances. With respect to decedent's finances, Doris testified that she did only what decedent asked her to do and that decedent did not seek her advice on financial matters (Oct. 16, 1991, Tr. 109-11). Henry also testified that, with respect to decedent's finances, he and Doris did only what decedent wanted done (Oct. 16, 1991, Tr. 82-83). No witness contradicted the testimony of Henry and Doris on this point.

The evidence also showed that, after receiving a substantial oil and gas bonus in 1981, decedent made many monetary gifts to family members and made especially large gifts to Henry and Doris. 6/ In January 1989, after decedent entered a nursing home as a result of a stroke suffered in September 1988, she deposited approximately $43,700 into a special account in the names of Henry and Doris, to be used to pay decedent's nursing home expenses (Oct. 16, 1991, Tr. 118-20).

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fn. 4 (continued)
presence or absence of independent counsel. He apparently made a finding on this point out of an abundance of caution.

5/ There were conflicts in the testimony as to whether decedent actually suffered a stroke at that time. All witnesses agreed, however, that, by the time she executed her will in 1976, decedent was in a wheelchair and needed physical assistance.

6/ On Dec. 22, 1981, appellant received an oil and gas bonus in the amount of $236,780.99. See Oct. 16, 1991, Tr. 82. Decedent gave Henry and Dorisa $50,000 cashier's check in Aug. 1982 and a $100,000 CD in July 1985.

Much of the testimony about decedent's finances concerned the period after decedent received the bonus. The record shows that, at the time she executed her will, decedent was on welfare (E.g. Oct. 16, 1991, Tr. 110). Doris testified that decedent had a small checking account at that time and balanced it herself . Id.

[3] In Ely, the Board stated:

> Even where a testator is entirely dependent upon a will beneficiary for shelter, food, and medication, a confidential relationship is not shown by these circumstances alone. Rather, in the cases where the Board has found a confidential relationship, the will beneficiary has had control over the testator's finances. See Estate of Virginia Enno Poitra, 16 IBIA 32 (1988). [7/]
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> The existence of a power of attorney may, in appropriate circumstances, establish that a confidential relationship existed.

(20 IBIA at 208). In Ely, the Board noted that, even though the will beneficiary had a power of attorney from the decedent, the document was not signed until 3 weeks after the decedent's will was executed. The Board found that the power of attorney did not prove the existence of a confidential relationship between the beneficiary and the decedent at the time the will was executed.

In this case, there is no evidence that Henry and Doris had a power of attorney, a guardianship, or any similar power over decedent or her finances until January 1989, when decedent turned over her funds to them to be used for her care. To the contrary, the evidence showed that decedent controlled her own finances until that time.

The Board finds that there was no confidential relationship between decedent and Henry, or between decedent and Doris, at the time decedent executed her will in February 1976. It therefore reverses Judge Reeh's finding that a confidential relationship existed in this case.

Having found that no confidential relationship existed, the Board affirms Judge Reeh's use of the basic four-part test for undue influence.

Appellant does not specifically contend that undue influence was shown under the four-part test. Rather, he contends only that the four-part test was inapplicable. Giving appellant the benefit of the doubt, however, the Board construes his appeal as having raised a challenge to Judge Reeh's conclusion that no undue influence was shown under the four-part test.

7/ In Poitra, 16 IBIA at 37, the Board stated:

"[T]he cases where the Board has found that a confidential relationship existed have been cases where an individual exercised control over the testator's finances, through a power of attorney, a guardianship, a role as 'payee' of the testator's Individual Indian Money account funds, or a similar role. Estate of Julius Benter, 1 IBIA 24 (1970); Estate of [Charles Webster] Hills, supra; Estate of Philip Malcolm Bayou, 13 IBIA 200 (1985) * * *; Estate of Roger Wilkin Rose, 13 IBIA 331 (1985); Estate of Jesse Pawnee, [supra]."

Judge Reeh's September 23, 1993, order summarizes the testimony of the several witnesses in this matter, many of whom were disinterested parties. The Board has also reviewed the testimony independently. It finds that the testimony is virtually unanimous that decedent had a strong will and could not have been dominated by Henry or Doris. Even appellant testified to the fact of decedent's strong will (Oct. 16, 1991, Tr. 182, 184).

The Board finds that undue influence has not been shown under the four-part test. It therefore affirms Judge Reeh's order in this regard.

Two more matters remain to be addressed, concerning two claims allowed by Judge Reeh. Again, the Board exercises its authority "to correct a manifest injustice or error where appropriate," because no party objected to payment of the claims.

Judge Reeh wrote to counsel for appellant and appellees on August 11, 1993, stating:

> I anticipate publishing a decision in this case within the month.
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> 43 CFR Section 4.281 allows each of you to apply for award of attorney fees. Kindly review this regulation and - if you choose - submit applications together with appropriate proofs before the 3rd day of September. Please also forward copies to one another.
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> Costs of the transcript may be submitted as a proposed charge of administration.

In response to this letter, counsel for Henry and Doris Parker submitted an application for attorney fees in the amount of $22,975, plus $163.21 in expenses. He also submitted a claim in the amount of $784 for preparation of a transcript of the October 16, 1991, hearing.

Judge Reeh allowed attorney fees in the amount of $7,166.67, chargeable against the interests of Henry and Doris Parker. He also allowed the $784 claim for preparation of a transcript "as a cost of administration to be taxed against the estate as a whole" (Sept. 23, 1993, Order at 6).

[4] 43 CFR 4.281(a) provides that petitions for award of attorney fees "shall be filed prior to the close of the last hearing," although subsection 4.281(b) makes it clear that supplemental claims may be filed later for subsequent proceedings.

There is nothing in the record to show that counsel submitted a petition for award of attorney fees prior to the close of the last hearing on October 16, 1991. Rather, it clearly appears that counsel did not submit an application for attorney fees until invited to do so by Judge Reeh on August 11, 1993. The Board finds that Judge Reeh's approval of a claim for attorney fees under these circumstances was error and must be reversed.

Judge Reeh also erred in allowing a claim against the estate for preparation of a hearing transcript. Except for claims for attorney fees made under 43 CFR 4.281, all claims against a decedent's estate are subject to 43 CFR 4.250, which requires that such claims be presented prior to the conclusion of the first hearing. 8/

[5] More importantly, under present law, preparation of the transcript of an Indian probate hearing, in cases where such transcripts are prepared, 9/ is the responsibility of the Department of the Interior, which acts as trustee in the probate of Indian trust estates. It would be a clear breach of trust to charge an Indian decedent's estate for a task which is the responsibility of the trustee. The Board finds that Judge Reeh's approval of a claim for preparation of a hearing transcript was in error and must be reversed. 10/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board affirms Judge Reeh's holding that no undue influence was shown but modifies that holding to state that there was also no showing of a confidential relationship between decedent and Henry and Doris Parker. The Board reverses Judge Reeh's allowance of claims for attorney fees and preparation of a hearing transcript.

The Bureau of Indian Affairs shall distribute this estate in accordance with Judge Reeh's September 23, 1993, order approving will, except that no claims shall be paid from the estate.

_____
Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

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8/ One other type of cost may be charged to the estate. Under 43 CFR 4.234, the Administrative Law Judge may order witness and interpreter fees to be paid from the estate.
9/ Transcripts are not required in all cases. See, e.g., 43 CFR 4.236(b); 4.320(c).
10/ Counsel for Henry and Doris Parker may contact the Director, Office of Hearings and Appeals, at the address shown on the letterhead of this decision, to make arrangements for resolution of this matter. Under no circumstances should counsel charge his clients for this expense.